STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
v	No. 252373 Wayne Circuit court
SEAN PATRICK TERRY, Defendant-Appellant.	LC No. 03-008857-01

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery. MCL 750.529. He was sentenced to serve ten to twenty years in prison. He now appeals and we affirm.

The victim is a cab driver who was dispatched to pick up defendant at a home in Canton. Defendant directed him to take him to an address in Detroit. According to the victim, after arriving at the destination, defendant hit him over the head with a tire iron and robbed the victim of his money.

Defendant admits to taking the cab to Detroit, but denies committing the robbery. Rather, defendant's theory was that someone else approached the car and attacked the victim. Defendant claims he fled from the scene during the attack. Defendant further theorizes that the victim falsely claimed that defendant was his assailant because the victim knew defendant was going to Detroit to buy drugs and that the victim feared getting into trouble if admitted that knowledge.

Defendant raises four arguments on appeal and we begin by addressing his last argument, which is the most substantial. The transcript of the first day of trial is unavailable, with the court reporter apparently being unable to locate the tapes from that day. A hearing was held to settle the record. The appellate prosecutor presented a proposed statement of facts from the first day of trial, prepared with the assistance of the trial prosecutor, who apparently took extensive notes.[1]

[1] The trial prosecutor was not available to attend the hearing on the motion to settle the record. Further, we note that the prosecutor's proposed statement of facts is not signed by the trial prosecutor nor does it appear that it was accompanied by an affidavit signed by the trial
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Defendant presented a somewhat less detailed proposed statement of facts. Appellate defense counsel indicated that she had spoken with trial counsel, who was unavailable to attend the hearing and who indicated to appellate counsel that he had no significant recollection of the events which occurred during the first day of trial. Ultimately, the trial judge, whose recollection appears to have been stronger than defense counsel's, but not as detailed as the trial prosecutor's, adopted the prosecutor's proposed statement of facts as the record of the first day of trial, but also included defendant's statement subject to a commentary on it that the trial judge put on the record at the hearing. The hearing concluded with defense counsel requesting that the hearing be continued until the trial prosecutor was available to testify so that the prosecutor's recollection could be explored in greater detail. The trial court denied that request.

We begin by noting that we do not approve of the trial court's refusal to grant defendant's request to continue the hearing until the trial prosecutor was available to testify as to the proceedings on the first day of trial. As this Court observed in *People v Horton (Aft Rem)*, 105 Mich App 329, 331; 306 NW2d 500 (1981), a defendant's right to appeal may be so impeded by the inability to obtain the transcripts of criminal proceedings that a new trial must be ordered. A new trial is in order when the lack of transcripts makes it impossible to review the regularity of the proceedings, and a new trial is necessary to ensure the defendant's right of appeal under Const 1963, art 1, § 20. At a minimum, the trial court should have continued the matter over until the trial prosecutor was available to appear. In so doing, the trial court ran a great risk of denying defendant's due process rights, for no greater reason than the trial court's stated desire to be finished with the matter that day.

With that said, upon careful examination of this matter, we are not persuaded that defendant's right to appeal has, in fact, been denied or that he was otherwise denied due process. It is agreed that the following events happened on the first day of trial: defendant brought a motion to suppress the line-up identification, a motion to compel discovery, the jury selection, a request for partial self-representation, and the prosecutor's opening statement. Even accepting defendant's version of events, we do not believe that any winning argument for defendant could have arisen out of the first trial day.

With respect to the line-up issue, there are two important factors in concluding whether the lack of the transcript of the hearing prejudices defendant. First, there is no dispute regarding the victim's identification of defendant: defendant admits to being in the victim's cab at the time of the robbery. The dispute is not over whether the victim correctly identified defendant as his passenger, but whether the victim testified truthfully that he was attacked by his passenger rather than by a third-party as defendant alleges. Second, there was a defense attorney (not defendant's trial counsel) present at both the photographic line-up and the corporeal line-up. Appellate counsel could have consulted with both of those attorneys to determine if the attorneys noted any irregularity in the line-up proceedings that would have been raised at the hearing on the first day of trial. Defendant has made no offer of proof regarding such an issue. For these reasons, there is no basis for believing that a viable issue existed on the identification matter.

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prosecutor vouching for its accuracy.

With respect to the discovery request, it appears that all matters requested were eventually supplied and, therefore, the discovery issue became moot.

Turning to the jury selection, it is conceivable that a transcript may have revealed some irregularity in that matter. But defendant did not exhaust his peremptory challenges. Therefore, he failed to preserve for appeal any issue related to the jury selection. *People v Schmitz*, 231 Mich App 521, 526-527; 586 NW2d 766 (1998); *People v Hubbard (Aft Rem)*, 217 Mich App 459, 467; 552 NW2d 493 (1996). Therefore, even if there was a defect in the process, review was precluded.

Turning to the prosecutor's opening statement, defendant does allege that the prosecutor made an improper statement regarding a fact that would not be brought into evidence. At the hearing on this matter, the trial court indicated that any improper comments by the prosecutor during opening statement would have been cured by the trial court's general instructions to the jury that comments by attorneys are not evidence. Absent any suggestion by defendant that more serious violations occurred, we are satisfied with the trial court's response to this matter.

This leaves the issue of self-representation. This does, in fact, present a serious matter. Indeed, defendant separately raises the issue regarding whether he should have been permitted to represent himself. Specifically, defendant requested and was granted permission to cross-examine the victim during the trial. Although a criminal defendant has a constitutional right to self-representation, before exercising that right the trial court is obligated to give the defendant certain advice. Specifically, MCR 6.005(D) provides in part as follows:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentenced required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

At the hearing on the motion to settle the record, both the trial judge and defendant agreed that there was some discussion regarding defendant's self-representation on that first trial day, including a warning by the trial court regarding the perils of self-representation. But it is not clear that MCR 6.005(D) was strictly followed.

In any event, we are not persuaded that MCR 6.005(D) applies in situations like the case at bar where the defendant engaged in partial self-representation. Indeed, it is overstating the case to say that defendant represented himself. At most, he served as his own co-counsel with respect to a single witness. Indeed, trial counsel was available to consult with defendant regarding the cross-examination of the victim and counsel even handled the objections that arose

during the questioning of the witness.[2] The point being that this is not a case of a defendant waiving the right to be represented by a lawyer. MCR 6.005(D) by its terms applies where the defendant waives that right.

As the Supreme Court explained in *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004), court rules are construed in the same manner as statutes:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. Similarly, common words must be understood to have their everyday, plain meaning.

The clear and unambiguous words of the court rule state that the rule applies where the defendant waives the right to be represented by a lawyer. Because defendant did not waive the right to be represented by a lawyer, the court rule does not apply. Moreover, defendant does not point to any authority, nor are we aware of any such authority, that requires any special colloquy by the trial court before permitting a represented defendant to participate in the trial by questioning one of the witnesses. Furthermore, the one warning which defendant argues on appeal that was inadequate is the only warning that the trial court specifically found was covered during the first day of trial, the warning regarding the perils of self-representation.

For the above reasons, we conclude that there is no basis for believing that any further development of the record of the first day of trial would reveal any basis for reversing defendant's conviction on the issue of self-representation.

Turning to the other issues raised by defendant on appeal, defendant first argues that he was denied the right to effective assistance of counsel. The standard for reviewing claims of ineffective assistance of counsel was set forth by the Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must

[2] There is some indication when the issue was initially raised that the prosecutor argued that if defendant was to cross-examine the witness himself, he, rather than defense counsel, would have to handle any objections during direct examination as is the practice when there are multiple attorneys representing a party. It is clear, however, that the trial court did not enforce that rule.

> overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A claim of ineffective assistance of counsel should be raised in a motion for new trial or for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). In the absence of such a hearing, our review is limited to mistakes apparent on the record. *Id.*

Defendant first argues that he was denied effective assistance of counsel by counsel's refusal to subpoena certain witnesses. First, the record does not establish that counsel refused to subpoena those witnesses. Second, even if counsel did refuse to subpoena those witnesses, the choice of which witnesses to call represents trial strategy and defendant has made no showing to overcome the presumption that this represents sound trial strategy. Third, defendant has not demonstrated any prejudice—he has not made any offer of proof regarding what beneficial testimony those witnesses could have offered.

Defendant next argues that he was denied effective assistance of counsel because counsel had a conflict of interest because he lived in a neighborhood where defendant had previously sold drugs. Defendant, however, has made no factual showing that such a conflict did, in fact, exist nor any showing that such a conflict in any way affected counsel's performance at trial.

Defendant's next claim of ineffective assistance is that counsel failed to obtain the cab driver's log book through discovery from the prosecutor. The log book was, in fact, turned over to the defense during trial. Defendant, however, fails to demonstrate any benefit to the defense from the log book. Accordingly, even assuming that defense counsel could have obtained it earlier and failed to do so, we see no possible prejudice to defendant arising from that failure.

Finally, defendant argues that defense counsel was ineffective for not objecting to the procedure employed by the trial court when defendant made the request to represent himself with respect to the cross-examination of the victim. First, we are unclear what prejudice could possibly have resulted from counsel's failure to object on the basis of the trial court inadequately handling the matter. If the trial court did, in fact, adequately handle the matter, then any such objection would be futile. On the other hand, if the trial court, as defendant seems to suggest, failed to follow any required procedures, then that would provide a basis for appellate relief. In short, because there could be no benefit to defendant for his counsel to object, then it follows that there can be no prejudice from the failure to do so.

Second, because defendant does have an absolute constitutional right to self-representation, *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), we fail to see how an attorney has an obligation to stop his client from exercising that constitutional

right. At most, the attorney may have an obligation to advise the client against doing so. That is, it would be similar to a client who, despite counsel's advice to the contrary, chooses to make a statement to the police. The attorney may advise against it, but ultimately he cannot prevent his client from doing so. Therefore, in the case at bar, defendant's attorney may at most have had an obligation to advise defendant against handling the cross-examination of the victim himself. But such advice would naturally be off the record and, therefore, to establish such inadequate advice would have required a *Ginther* hearing in the trial court. In the absence of such a hearing, we cannot conclude that counsel inadequately advised defendant on this issue.

For the above reasons, we are not persuaded that defendant has established that he is entitled to a new trial due to ineffective assistance of counsel.

Defendant next argues that he is entitled to a new trial because the prosecutor allowed a prosecution witness to testify falsely or avoid key questions. Defendant offers two bases for concluding that the victim testified falsely: (1) that the victim's testimony conflicted with police reports that stated the victim drove the cab into the garage door of the house where he had parked before the robbery and (2) it was preposterous to believe that a person would call a cab to his home, take the cab while wearing a business suit to an address in Detroit, all with the intention of robbing the cab driver. But the mere fact that the victim's testimony was inconsistent with that of other witnesses, or even that the scenario painted by the victim might seem incredulous, does not establish that he testified falsely. At most, it establishes that he testified inaccurately. More to the point, however, it does not establish that the prosecutor knew that the witness was going to testify falsely. A prosecutor may not knowingly present false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). But the mere fact that a prosecution witness' testimony differs from that of another witness does not mean that the prosecutor must disbelieve its own witness. *Id.* at 278-279. In short, this merely presents a question present in all cases, the determination of the credibility of a witness. And such determinations are the province of the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Apparently, the jury either concluded that the victim was testifying accurately or that, to the extent the jury may have found part of the victim's testimony to be inaccurate, it did not adversely affect the victim's credibility on new issues.

Defendant's final issue is one that we have dealt with already, namely whether there was a valid waiver of counsel. For the reasons discussed under the first issue, we are not persuaded that defendant is entitled to a new trial on this basis.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray